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No. 141, Original

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

REPLY IN SUPPORT OF MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE

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INTRODUCTION

El Paso County Water Improvement District No. 1 ("EPCWID") should be granted leave to intervene in this original action interpreting and enforcing the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"), as established in EPCWID's Motion for Leave to Intervene as a Plaintiff ("Motion"). This reply is an omnibus reply to the four responses filed to the Motion, each of which fails to refute EPCWID's demonstration that it has a "'compelling

interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)). The United States ("U.S. Resp."), New Mexico ("N.M. Resp."), and Texas ("Tex. Resp.") each oppose EPCWID's intervention on the grounds that EPCWID does not demonstrate a unique and compelling interest sufficient to support intervention and that Texas or the United States adequately represent EPCWID's interests in this litigation. Colorado took no position on the Motion.

In opposing the Motion, the parties misunderstand or choose to ignore the critical interrelationship of the Rio Grande Project ("Project") and the Compact, and EPCWID's interests and role in the interstate Project. The Rio Grande Compact cannot be interpreted or enforced absent the interpretation and enforcement of rights and obligations under the Rio Grande Project Act, Act of Feb. 25, 1905, ch. 798, 22 Stat. 814, and in the Project in which EPCWID has vital interests. EPCWID's role in the Project is a compelling bi-state interest which is unique from any other Texas water user. Neither Texas nor the United States represent EPCWID's interests. EPCWID should be granted leave to intervene.

ARGUMENT

I. THE PARTIES OPPOSING EPCWID'S MOTION TO INTERVENE MISUNDERSTAND THE INTERRELATION OF THE RIO GRANDE COMPACT AND THE RIO GRANDE PROJECT.

The parties opposing the Motion erroneously argue that EPCWID raises non-Compact issues as a basis for its intervention. *See* U.S. Resp. 11; Tex. Resp. 5. EPCWID fully understands this is a Compact action within the original jurisdiction of this Court, and, as explained in the Motion and Memorandum in Support ("Mem. in Supp."), at 14-16, EPCWID seeks interpretation and enforcement of the Compact to protect the Project and EPCWID's interests therein. The Court must review the Rio Grande Project Act and contracts entered into for operation of the Project in order to interpret and enforce the terms of the Compact. Indeed, Texas's Complaint (leave to file granted Jan. 27, 2014) seeks a declaration of its rights "pursuant to and consistent with the Rio Grande Compact *and* the Rio Grande Project Act," Texas Complaint 15, Prayer ¶ 1 (emphasis added), and an order directing New Mexico to comply with the Rio Grande Project Act and award damages to Texas for violation thereof, *id.* 15-16, ¶¶ 2-3. The Court has decided it has jurisdiction over Texas' Complaint, and it is disingenuous for Texas, and the other parties, to now argue that EPCWID's interests which relate to the Rio Grande Project Act, are not relevant to this case or are otherwise insufficient to support intervention. EPCWID's compelling interest

directly stems from New Mexico's violation of the Compact *and* the Rio Grande Project Act, and cannot be parsed for purposes of interpreting and enforcing the Compact.

EPCWID's rights and interests in the Rio Grande Project, the operation of the Project, and related rights and interests in the Compact cannot be separated so as to preclude intervention. As explained in Texas' Complaint, the protection and integrity of the Rio Grande Project represents what Texas bargained for at the time of the Compact. Texas Complaint ¶ 11 (stating that a fundamental premise of the Compact was that "New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico"); *see* Brief for the United States as *Amicus Curiae* 14 ("If New Mexico's only obligation under the Compact were to deliver water to Elephant Butte, and if New Mexico were then free to allow depletions of the Project water supply available below Elephant Butte, then Texas bargained for little under the Compact."). And, New Mexico's Compact violations are directly and unlawfully impacting the Project. *See* Texas Complaint 15, Prayer ¶ 2(b) (seeking an order directing New Mexico to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project"); United States Complaint in Intervention ¶ 14 ("[E]xtraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water

stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.").

In its response, Texas oddly attempts to minimize the import of the Project to the Compact, stating "[t]he Compact *may* use the Project as a method to accomplish delivery of Texas' apportionment. . . ." Tex. Resp. 14 (emphasis added). But this ignores that the Compact *does* – and was created to – protect the Project and its water supply. *See* Mem. in Supp. 5-6. Texas' assertion that EPCWID's interests in Texas' apportionment of the Rio Grande are "not unique," Tex. Resp. 14, ignores that EPCWID receives Texas' share under the Compact by operation of the Project; EPCWID has federal contracts with regard to its Project allocation; EPCWID owns and operates Project works in both New Mexico and Texas; and EPCWID is ultimately responsible for Project water delivery to water users in Texas. *See* Declaration of Jesus Reyes, General Manager of EPCWID, ¶¶ 4, 8-9, 11, 15, located in the appendix to this brief ("Reyes Decl."), App. 2-6. The Project is not a mere conduit through which water passes freely to Texas and EPCWID. It is essential that the Project function as was intended in 1938 to ensure EPCWID (and thereby Texas) receive what was intended under the Compact. *See* Texas Complaint ¶¶ 11, 18-19; Texas Brief in Support of Motion for Leave to File Bill of Complaint 3.

The Rio Grande Project is an integrated interstate reclamation project, fully dependent on exacting Compact compliance to function. The Project cannot

be and is not operated as segregated units based on the Texas and New Mexico border. Reyes Decl. ¶¶ 5-6, App. 2. EPCWID and Elephant Butte Irrigation District ("EBID") have a shared interest in storage and releases in New Mexico, as water released from storage, supplemented by return flows from New Mexico irrigators, comprises EPCWID's Project water delivery. *See id.* ¶ 4, App. 2. EPCWID has a compelling interest in the determination of the Compact question raised in Texas' Complaint, at ¶¶ 18-19: Can New Mexico interfere with Project releases, which are comprised of New Mexico's Compact deliveries, after New Mexico has made these deliveries? The answer is no, and EPCWID's vital interest in the answer to this question supports intervention in this case.

II. EPCWID SATISFIES THE REQUIREMENTS FOR NON-STATE INTERVENTION IN AN ORIGINAL ACTION.

EPCWID agrees that the standard for intervention of a non-state entity in an original action is whether the entity has a compelling interest unique from other citizens and whether no state can adequately represent the interests of the putative intervener. *See South Carolina v. North Carolina*, 558 U.S. at 266. That standard must be applied in the specific factual context of the original action, and the Court has established no bar to intervention when, under the specific circumstances, the intervener presents a compelling interest. Here, EPCWID has demonstrated

it has a compelling interest in the Rio Grande Compact because of the interrelationship of the Compact and the Rio Grande Project, in which EPCWID has an essential role. This interest is not wholly shared by any other Texas water user, and neither Texas nor the United States can represent EPCWID in this litigation.

A. EPCWID HAS A COMPELLING INTEREST IN THIS COMPACT ACTION BECAUSE OF ITS INTERESTS AND ROLE IN THE INTERRELATED RIO GRANDE PROJECT.

EPCWID is the sole direct beneficiary of the Project in Texas. EPCWID is not claiming Texas' position as a Compact party, *see* N.M. Resp. 8, but seeks to intervene to protect its own interests. Moreover, EPCWID's role in the operation of the Project and interests therein are not limited as the United States has characterized them. U.S. Resp. 10 (stating the United States determines Project water allocation). As explained by the Reyes Declaration and the histories of the Project and the Compact, EPCWID plays a critical role in the operation of the Project, and such role predates the Compact. This interest is unique and compelling and must be represented in this litigation as any interpretation and enforcement of the Compact pursuant to Texas' Complaint will directly impact EPCWID's interests.

EPCWID's role in the Project dates to the early twentieth century. EPCWID's predecessor, the El Paso Valley Water Users' Association ("Association"), was necessarily created in order for the Project to be authorized and begin operations. *See* U.S. Resp. 3. The Association was created in 1905, following Congressional authorization of the Project by the Rio Grande Project Act, to represent water users who would receive water from the Project. *See* Texas Water Code § 55.161(c)(1) (stating EPCWID's purpose includes "cooperat[ing] with the United States under the federal reclamation laws for the purpose of construction of irrigation and drainage facilities necessary to maintain the irrigability of the land"); *see also* U.S. Geological Society, *Third Annual Report of the Reclamation Service 1903-1904*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 54-55 ("[M]any of the [Reclamation] projects under consideration embrace tracts of land in private ownership, and it is necessary to deal at the outset with several hundreds or even thousands of landowners. If the project is carried out, these landowners must ultimately be brought together through an organization for the management and operation of irrigation works. It is found essential to create this organization at an early date, so that instead of dealing with hundreds of individuals separately it will be possible to transact business with one man or with a small committee of men representing all of the water users."). While EPCWID is formed under state law, the basis for its existence is one of federal law and requirements.

Prior to the execution of the Compact, EPCWID and EBID entered into a contract in 1938 and established the proportions of Project water to be allocated to the New Mexico and Texas districts. Reyes Decl. ¶ 6, App. 2; *see also* Appendix to Brief of the United States as *Amicus Curiae* (Dec. 10, 2013) (reprinting the 1938 contract); Texas Brief in Support of Motion for Leave to File Bill of Complaint 2 ("The Rio Grande Project, including the reservation of all necessary water rights, pre-dates the Rio Grande Compact, and is the basis and provides the means for the equitable apportionment of the waters of the Rio Grande between Texas and New Mexico."). Storage, allocation, and release of water from Elephant Butte and Caballo Reservoirs are accomplished pursuant to the 2008 Operating Agreement between the United States, EPCWID, and EBID. Reyes Decl. ¶¶ 11-12, App. 4-5. The parties to the Operating Agreement participate in an Allocation Committee which determines annual allocations. *Id.* ¶¶ 13-14, App. 5. EPCWID, however, determines and directs the timing and magnitude of releases from the Reservoirs to meet the needs of EPCWID for its share of Project water. *Id.* ¶ 13, App. 5. During the irrigation season these decisions are communicated in daily conference calls with the United States Bureau of Reclamation to provide direction regarding the water allocation and releases from Project storage in New Mexico. *Id.*

Each response ignores the role EPCWID actually plays in the interstate operation of the Project, and instead cites cases concerned with state sovereign

or intrastate interests to persuade the Court to ignore that important role. *See* U.S. Resp. 16 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)); N.M. Resp. 15-16 (citing *Tarrant Reg'l Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120 (2013) and *Hinderlider*). These cases do not refute that EPCWID has demonstrated a compelling interest in this dispute about interstate distribution of water and preservation and protection of Project water subject to the Compact. Both cases stand for the unremarkable proposition that water users within each state are bound by the Compacts entered into by their respective States. *See Tarrant*, 133 S. Ct. at 2133; *Hinderlider*, 304 U.S. at 108. EPCWID's intervention is not based on any argument with the substance of the Rio Grande Compact as entered into by Texas. Rather, its compelling interest requiring intervention is to ensure New Mexico complies with the terms of that Compact and that EPCWID's related rights and interests in the Project are protected. EPCWID's interests in the inherently interstate contracts which govern operation of the interstate and international Project are not "akin to private interests" in contracts, as argued by the United States. U.S. Resp. 11. Those contracts are tied to New Mexico's compliance with the Compact, and satisfaction of the rights of the contracting parties is bound up with compliance by the parties to the Compact.

The responses rightly discuss *South Carolina v. North Carolina*, but the United States, New Mexico,

and Texas are all incorrect in their assertions that EPCWID is most similar to the City of Charlotte, the only entity in that case whose request to intervene was denied. *See* U.S. Resp. 13; N.M. Resp. 7-8; Tex. Resp. 22. EPCWID is unlike Charlotte, which had nothing to "distinguish it in kind from other members of the class" of North Carolina water users, and the litigation would not call into question "the viability of Charlotte's operations. . . ." *South Carolina v. North Carolina*, 558 U.S. at 274. *This* litigation, however, will have a direct impact on the Project and EPCWID's operations: EPCWID has a unique and essential role in Project operations both within New Mexico and Texas; EPCWID works with the United States and EBID to determine allocations to each district, when and in what quantity the water is to be released from Project storage, and then delivers that water to its members in Texas, as well as to some EBID members in New Mexico. The root of Texas' Complaint is that New Mexico is violating the Compact by interfering with these essential allocations and deliveries. There is no "class" of similar users in Texas, as discussed below. EPCWID is not a water user at all, but rather a critical entity with critical interests in the very fulcrum of the Rio Grande Compact: the Rio Grande Project. EPCWID is not like Charlotte, but as discussed in the Memorandum in Support, at 15-19, is in a similar position to the two entities allowed to intervene.

If the parties' argument that EPCWID does not satisfy the Court's standard for non-state intervention

prevails, there would *never* be a non-state entity that could intervene in an original action. While the Court has set a high standard for intervention in original actions, it has not established a rule prohibiting intervention of non-state parties. Rather, each case and each request for intervention by a non-state entity must be premised on the specific and unique facts. *See South Carolina v. North Carolina*, 558 U.S. at 270. Indeed, the Court stated "[t]hat the standard for intervention in original actions by nonstate entities is high, however, does not mean that it is insurmountable." *Id.* at 268; *see also id.* at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part) (stating that a private entity could satisfy the *New Jersey v. New York* standard for intervention). EPCWID has "a compelling interest in [this action] that is not fairly represented by the States." *Id.* at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part). The complexity of the facts and law inherent in this original action support and necessitate EPCWID's intervention.

The Project cannot be disaggregated into separate state portions and limit the parties to this litigation to only the state parties to the Rio Grande Compact. The Court recognized this in permitting the intervention of the United States, a non-compacting party, to protect its Project interests. The most recent original jurisdiction case over which the Court has assumed jurisdiction, in fact, names as defendants the state of Tennessee, the city of Memphis, Tennessee, and the Memphis Light, Gas & Water Division.

Mississippi v. Tennessee, No. 220143 (motion for leave to file complaint granted June 29, 2015). The Court has recognized that non-state entities may be critical to resolving interstate disputes, and EPCWID is such a critical entity here.

B. EPCWID'S INTERESTS ARE NECESSARILY AND UNDENIABLY BI-STATE INTERESTS.

The responses erroneously dismiss EPCWID's bi-state interests. Texas claims EPCWID has no bi-state interests because it is a Texas entity whose water interests in the Rio Grande is shared with "all of the other citizens of Texas. . . ." Tex. Resp. 22; *see* U.S. Resp. 13. This argument has no basis in fact or law. As explained in the Memorandum in Support, at 17-18, and herein, while EPCWID is a Texas entity, its creation was necessitated by the authorization of the interstate Rio Grande Project; and its continued existence is dependent on the proper functioning of that Project in *both* New Mexico and Texas. EPCWID has repaid the United States for the construction of that Project which includes the two critical storage reservoirs in New Mexico (Elephant Butte and Caballo). EPCWID's interests relate not just to the functioning, operation, and maintenance of works within the District's boundaries in Texas, but the proper functioning and operation of the entirety of the Project in and through New Mexico. *See* Reyes Decl. ¶¶ 4-7, App. 2-3. Moreover, EPCWID's interests in the Project include Elephant Butte and Caballo

Reservoirs in New Mexico. Simply because the United States holds legal title to the physical reservoirs and dams does not diminish EPCWID's significant interest in the storage and releases of water. Rio Grande Project water is allocated to and belongs to EPCWID (and EBID), not the United States.

EPCWID's role in the Project's integrated, interstate system of water delivery extends beyond daily communications and the direction of actions to be taken in New Mexico. In addition to EPCWID's role and interests in Project storage and releases, water deliveries are made by a system of canals, drains, laterals, and diversion structures that do not obey state borders. Reyes Decl. ¶ 7, App. 2-3; *see also* Elephant Butte Irrigation District's Reply to Briefs Opposing Motion for Leave to Intervene (March 20, 2015), Declaration of Gehrig "Gary" Lee Esslinger, ¶ 21, App. 7, 9 (diagram). This fact is embodied in the 1995 Agreement entered into by EBID and EPCWID for joint operations in New Mexico and Texas ("1995 Agreement"), which recognizes, among other things, that Project works "cross and re-cross the state boundary line between New Mexico and Texas at numerous places." Reyes Decl. ¶¶ 16-19, App. 6-7. Pursuant to the 1995 Agreement, EBID personnel delivers water to Texas users within unit 6A and EPCWID personnel delivers water to all New Mexico users in unit 6B. Both of these units extend at length into New Mexico and Texas respectively. In turn, EBID and EPCWID operate and maintain the Project works in those units irrespective of state lines.

EPCWID's Project interests and obligations are not confined to Texas' border, but extend into and through New Mexico.

Texas attempts to distinguish EPCWID from Duke Energy, one of the entities allowed to intervene in *South Carolina v. North Carolina*, by alleging that the infrastructure owned and operated by EPCWID in both Texas and New Mexico is "not at all like" the infrastructure owned by Duke Energy. Tex. Resp. 23; *see also* N.M. Resp. 12 ("The fact that canals may cross a stateline is an unremarkable feature of modern irrigation systems."). *South Carolina v. North Carolina*, however, did not establish any precedent that EPCWID would only be allowed to intervene if it actually owned Elephant Butte Dam or Reservoir, *see* Tex. Resp. 23, and that would be an absurd result here. EPCWID has repaid the United States for its share of the entirety of Project construction, including the reservoir and dam; it owns and operates all Project works within Texas; operates and maintains significant cross-border infrastructure; and has contracts for its supply of water premised on effective and integrated functioning of the Project in New Mexico and Texas. Reyes Decl. ¶ 8, App. 3. EPCWID's interests in Project infrastructure and operations demonstrate EPCWID has the bi-state interests that satisfy the intervention standard.

C. EPCWID HAS A UNIQUE INTEREST WHICH IS NOT SHARED BY ANY OTHER TEXAS WATER USER AND ALLOWING EPCWID'S INTERVENTION WILL NOT OPEN THE FLOODGATES TO INTERVENTION BY OTHERS.

EPCWID's intervention will not open the floodgates of non-state intervention. Indeed, the only other non-state entity that may satisfy the Court's fact-specific intervention standard is EBID, whose motion to intervene is pending before the Special Master. The parties, however, express concern that there exists "any number of similarly situated entities in New Mexico and Texas," N.M. Resp. 14, who would seek leave to intervene if EPCWID's Motion were to be granted. Only two entities, Hudspeth Conservation and Reclamation District ("Hudspeth") and the City of El Paso ("City"), are identified in the responses as allegedly seeking to intervene if EPCWID is granted leave to do so. EPCWID's intervention, however, would not be precedent allowing Hudspeth and the City to intervene, as EPCWID is a unique entity that delivers Texas' share of Compact water to water users in Texas; there are *no other* entities performing this function.

Texas asserts that EPCWID is similarly situated to "all other water users in the State of Texas" and is "not the only entity within the State of Texas that relies on Rio Grande water or the Rio Grande Project." Tex. Resp. 15; *see also* N.M. Resp. 14 (grouping EPCWID, EBID, Hudspeth, and the City together

because "[a]ll . . . receive deliveries of Project water"). This simplistic characterization of EPCWID contains two glaring fallacies. First, EPCWID is not a water *user* at all; it "distribute[s] and apportion[s] all water acquired by [EPCWID] under a contract with the United States in accordance with acts of Congress. . . ." Tex. Water Code § 55.364. While the Texas Commission on Environmental Quality Certificate of Adjudication ("TCEQ Certificate") recognizes EPCWID "is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year," Motion, App. 10, EPCWID does not use the water itself, but rather delivers and distributes water to its members or contract holders, who in turn place the water to beneficial use. Texas' reliance on *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932), Tex. Resp. 5, is misplaced. In that case, the Court discussed prior decisions in which the Court held *water claimants* – not a water district with contracts with the United States for delivery of Project water to users – were represented by their states. EPCWID, however, is not a water claimant that operates solely within Texas, but delivers water from an interstate project relying on and using infrastructure in two states. *See also* Tex. Resp. 18-19 (relying on *Nebraska v. Wyoming*, 515 U.S. 1 (1995), for a similarly unavailing argument that individual water claimants cannot intervene in an interstate water dispute). Second, EPCWID does not simply "rel[y] on . . . the Rio Grande Project." Tex. Resp. 15. Contrary to Texas' characterization of EPCWID as a mere user who receives water from the Project, the history of the

Project and EPCWID demonstrate that EPCWID is an integral part of the Project, not only a recipient of Project water. Moreover, as explained in Part I, New Mexico's violations of the Compact are directly related to the Project – New Mexico is taking Project water which Texas correctly alleges is protected by the Compact.

The other Texas entities to file *amicus curiae* briefs in this matter – the City and Hudspeth – rely on EPCWID to obtain their water. The City has contracts for Project water with EPCWID, and its Project water delivery is dependent on water availability. *See* Brief of *Amicus Curiae* City of El Paso, Texas in Opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention 2 (Jan. 16, 2014) ("El Paso currently has contracts with [EPCWID] that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project."). The City's right to Project water is solely derivative of EPCWID's interests in the Project. The City has no independent, let alone compelling, interest in the Project and protecting the Project from New Mexico's Compact violations. To say that allowing EPCWID to intervene would prevent a principled distinction between EPCWID and those it supplies with water through federal contracts would require saying that Duke's intervention in *South Carolina* would support the intervention of all users of the power Duke generated. The Court has issued no such ruling, but it has

affirmed its standard to consider the propriety of intervention, a standard EPCWID satisfies here.

Hudspeth has contracts with the United States under the Warren Act, Act of Feb. 21, 1911, Pub. L. No. 61-407, 36 Stat. 925, which governs surplus waters, and not the Rio Grande Project Act. *See* Tex. Resp. 15 n.6. Section one of the Warren Act, codified at 43 U.S.C. § 523, provides that when a reclamation project "storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior . . . is hereby authorized . . . to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems. . . ." As acknowledged by Hudspeth, the water it receives is "Rio Grande Project water in excess of the needs of users within EPCWID, and drainage and return flows from Project Water delivered to EPCWID and used by EPCWID customers." Brief of Hudspeth County Conservation and Reclamation District No. 1 as *Amicus Curiae* in Support of Plaintiff's Motion for Leave to File Complaint 10 (Mar. 11, 2013). EPCWID and Hudspeth are not part of the same "class of affected Texas water users," Tex. Resp. 16, and granting EPCWID leave to intervene will not require Hudspeth to be made a party as well. Permitting EPCWID to intervene will not open the floodgates to other interveners nor make the case resemble an ordinary class action.

D. EPCWID'S INTERESTS ARE NOT REPRESENTED BY A PARTY TO THE ACTION.

Texas and the United States both assert that they can properly represent EPCWID's interests. EPCWID disagrees that either party, much less both, represents EPCWID's unique and compelling interests in this litigation. The United States argues that it can "adequately represent EPCWID's interest in protecting the Project's overall water supply from interception and interference by New Mexico." U.S. Resp. 15.[1] This statement, however, ignores that the United States was permitted to intervene to protect its sovereign interests and not EPCWID's specific interests regarding Project operations and delivery of Project water to comply with its obligations to water users. *See* Mem. in Supp. 26. The TCEQ Certificate provides that the joint certificate holders, the United States and EPCWID, are authorized to divert water in Texas, Motion, App. 10, but it is EPCWID that is authorized to use the Project water to make distributions to its members; and it is EPCWID, not the United States unilaterally, which decides how much should be released from storage in New Mexico and how water should be carried over from year to

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[1] EPCWID did not "simply adopt[] and incorporate[] by reference" the United States' complaint. U.S. Resp. 15. EPCWID specifically conditioned its adoption of the United States' complaint on the allegations and prayer of EPCWID's complaint in intervention. *See* EPCWID Complaint in Intervention, ¶¶ 1, 2.

year pursuant to the 2008 Operating Agreement. *See* Reyes Decl. ¶¶ 12-14, App. 4-5. The United States does not adequately represent EPCWID's interests as it has interests and obligations in the Project as a whole and with regard to deliveries to Mexico. Indeed, to ensure proper operation of the Project, EPCWID was compelled to file suit against the United States in 2007, which resulted in the Operating Agreement currently in place. *See El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. 2007); Motion at 7-8.

Texas asserts that it represents EPCWID as *parens patriae* because EPCWID is a political subdivision that Texas purports to supervise; Tex. Resp. 17; and that "EPCWID's right to water from the Rio Grande Project is derivative and dependent upon Texas' apportionment under the Compact." *Id.* 18. This ignores, however, that the Project – and EPCWID's interest and role therein – predate the Compact by over three decades. The Court must consider the Project, and contracts thereunder, to analyze and interpret the Compact. *See South Carolina v. North Carolina*, 558 U.S. at 273 (finding neither state represented Duke Energy's interests because neither state had signed the relevant agreement "or expressed an intention to defend its terms"). Other water users will be affected and bound by Texas securing its Compact apportionment. But the Court's rulings on the Compact will directly and immediately affect rights in and to the Project, rights

which are unique and vital to EPCWID. EPCWID should be granted leave to protect those unique interests.

New Mexico raises the specter that EPCWID's intervention will cause the Court to be "'drawn into an intramural dispute over the distribution of water.'" N.M. Resp. 22 (quoting *New Jersey v. New York*, 345 U.S. at 373). EPCWID recognizes that this is an interstate Compact dispute, and nothing before the Court would indicate that EPCWID thinks it may assert claims about intrastate distribution of water under Texas law. EPCWID seeks protection of its rights and interests in contracts controlled by federal law and embedded in the Rio Grande Project and the Rio Grande Compact. This case will determine whether New Mexico is complying with its obligations under the Compact, and such compliance is necessary for EPCWID to receive its allocation of Project water. While New Mexico may benefit from the Court characterizing the dispute that underlies this original action as being between Texas and EPCWID and its users, New Mexico's actions are violations of the Compact which are preventing EPCWID from receiving its annual water supply.

Texas also characterizes EPCWID's intervention as bringing an intramural dispute to the Court, stating EPCWID is under a "continuing right of supervision" by the state. Tex. Resp. 10. EPCWID, however, is not seeking relief from any supervision Texas may exercise over Texas water rights under state law. EPCWID seeks to intervene to protect its interests in,

and proper functioning of, the Project and ensure that it receives the water necessary to make all water deliveries to its users. The delivery and use of water *within* Texas is not at issue. EPCWID is unlike the city of Philadelphia, which sought to intervene in *New Jersey v. New York*, causing the Court concern that other political subdivisions or industrial plants would seek to intervene as well. *New Jersey v. New York*, 345 U.S. at 373. Philadelphia sought to intervene to protect its interests in the Delaware River, but the Court denied the motion because the city "represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River. . . . If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* What is at issue in this case is the ability of EPCWID to receive its share of Project water supply as a result of New Mexico's Compact violations. Even if Texas officials have a modicum of authority within the boundaries of EPCWID, no Texas official attempts to supervise any of the operations concerning Project water. Nevertheless, even assuming *arguendo* that Texas has some supervisory authority over EPCWID's use of water in Texas, Texas certainly does not have any supervisory authority or control over that part of Project water supply which must travel through New Mexico in order to reach EPCWID.

A similarly specious argument is that EPCWID seeks to impeach Texas' policy decisions. *See* U.S.

Resp. 10-11; N.M. Resp. 22. EPCWID has filed two briefs *amicus curiae* in support of Texas, and seeks to intervene as a plaintiff. EPCWID's "water use rights . . . are not dependent on the rights of" Texas, however, and thus Texas cannot represent those rights. *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part). The concern that a non-state entity's intervention will cause a state to be "judicially impeached on matters of policy by its own subjects" is not present here. *New Jersey v. New York*, 345 U.S. at 373. EPCWID seeks to intervene to represent its own interests in the Project and related interests in the Compact; it does not seek to impeach Texas' role in the Rio Grande Compact Commission or other policy-making with respect to the Compact.

CONCLUSION

EPCWID satisfies the Court's fact-specific test for non-state intervention and EPCWID's Motion to Intervene should be granted.

Respectfully submitted,

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July 2015

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO, Defendants.

DECLARATION OF JESUS REYES

1. The undersigned hereby makes the following unsworn declaration, under penalty of perjury, pertinent to the above-styled and numbered cause:

2. My name is Jesus Reyes. I am one of ten siblings of the Reyes family who farmed in the upper valley in the County of El Paso, Texas from the early 1940s through 1968. My wife and I own a home with three acres of land and 40 pecan trees. We have been irrigation water users for 38 years. I am employed by El Paso County Water Improvement District No. 1 ("EPCWID"), the proposed intervener, and currently serve as General Manager, a position I have held since 2003. Prior to my employment as the General Manager, I served on EPCWID's Board of Directors for three years.

3. As General Manager of EPCWID, my duties include supervision of all day to day operations of EPCWID. My duties also include overseeing all employees and departments, including all matters relating to water storage, allocation, and releases

from the Rio Grande Reclamation Project ("Project" or "Rio Grande Project") works in New Mexico, and allocation, distribution, and delivery of Project water in New Mexico and Texas.

4. EPCWID has rights to and receives Project water from Project facilities located in New Mexico, more than 100 miles north of the Texas border. EPCWID's rights include a right of storage in Elephant Butte and Caballo Reservoirs, rights to order releases of Project water from such reservoirs, and rights of delivery through both the New Mexico and Texas portions of the Project.

5. The operations of Elephant Butte Irrigation District ("EBID") and EPCWID (collectively, "the Districts") cross state lines with regard to storage and release of water, and delivery of that water. Both of the Districts operate in New Mexico and Texas. The Project could not operate otherwise.

6. The Rio Grande Project cannot be operated as independent units based on the state line of Texas and New Mexico. Project water which is stored and released in New Mexico is fully integrated with Project operations in Texas. Pursuant to a 1938 contract entered into between EPCWID and EBID, and approved by the United States Bureau of Reclamation ("Reclamation"), Project water generally is allocated to Project lands based on the irrigable acreage in New Mexico and Texas, in a ratio of 67/155 to EPCWID and 88/155 to EBID.

7. The Project water used to irrigate the Texas portion of the Mesilla Valley is diverted from the Rio Grande in New Mexico and flows through the

Project works in New Mexico, and ultimately through an irrigation canal that crisscrosses the Texas-New Mexico state line several times before being delivered to Texas lands. EPCWID has easements in New Mexico in canals now owned by EBID that are used to convey Project water to Texas lands.

8. Before 1996, EPCWID completed its repayment to the United States for EPCWID's share of the construction costs of the Rio Grande Project inclusive of the construction of Elephant Butte Dam and Reservoir in New Mexico. Based on that repayment, the United States conveyed to EPCWID most of the Project works in Texas, and easement rights to irrigation and drainage canals located in New Mexico that are used to transport Project water to Texas. That conveyance, called a Deed Without Warranty, dated January 19, 1996, is located in Appendix B to the Brief of the United States in Opposition to El Paso County Water Improvement District No. 1's Motion to Intervene. The deed is a true deed and not a mere "Quit Claim."

9. In 1980, the United States transferred operation and maintenance of the majority of the Project works in Texas to EPCWID pursuant to contract entitled "Transfer of the Operation and Maintenance of the Project Works." The 1980 Contract provided for allocation and delivery of Project water to EPCWID from and through the Project and also required completion of an "operational plan [to] be concluded between the United States and the District setting forth procedures for water delivery and accounting." EPCWID

1980 Contract, section 6.d, located in Appendix A to the Brief of the United States in Opposition to El Paso County Water Improvement District No. 1's Motion to Intervene. The United States retained the operation and maintenance of the Project Reservoirs, Elephant Butte and Caballo, in New Mexico; the bed and banks of the Rio Grande; and numerous diversion dam, flood control structures, the American Canal, and the American Extension Canal in Texas.

10. Reclamation makes releases from Elephant Butte Dam and Reservoir for purposes of delivery of water to Mexico in accordance with the 1906 Convention between the United States and Mexico, but only in coordination with EPCWID and EBID.

11. The allocation and release of Project water in and from Project reservoirs is accomplished pursuant to the 2008 Operating Agreement, an agreement relating to operation of the Project for the Districts among EBID, EPCWID, and Reclamation. The 2008 Operating Agreement was the result of the settlement of a lawsuit brought by EPCWID based in part on the failure of Reclamation to enter into an operating agreement as required by the 1980 contract.

12. Pursuant to the 2008 Operating Agreement, EPCWID, EBID, and Reclamation participate in an Allocation Committee regarding allocations of Project water to the two Districts. Following determination of annual allocations, EPCWID and EBID determine the timing and magnitude of releases from Elephant Butte and Caballo Reservoirs

including the height of the gate opening at Caballo to achieve the desired flow to meet the orders from the Districts with regard to deliveries.

13. During the primary irrigation season, EPCWID participates in daily conference calls with Reclamation to provide direction regarding water allocation and releases from Project storage in New Mexico. The water master for EPCWID, Robert Rios, an EPCWID employee under my supervision, participates in these conference calls. On behalf of EPCWID, he provides information and direction to Reclamation as to how much water Reclamation should release, the timing of such releases, and when and where it is needed, and all other relevant information and direction for purposes of Reclamation to release water in New Mexico for delivery to the Project in Texas. EPCWID provides such information and direction based on conditions on the ground in Texas within EPCWID, anticipated conveyance losses through New Mexico, and information from the EBID water master relating to EBID's New Mexico operations.

14. In advance of the irrigation season and throughout the year, pursuant to the 2008 Operating Agreement, Reclamation and the Districts work together to plan irrigation season water allocations and releases, including allocation of Project water stored in Project reservoirs in New Mexico.

15. In addition to directing Reclamation with regard to allocation, releases, and deliveries, EPCWID operates and maintains Project works in both

New Mexico and Texas, and delivers Project water to New Mexico Project water users, in addition to its Texas Project water users. Project canals, drains, laterals, and diversion structures do not follow state lines. Operation and maintenance of the irrigation facilities that cross the state line is performed by both EBID and EPCWID.

16. On August 9, 1995, pursuant to the Joint Powers Agreement Act of New Mexico and the Interlocal Cooperation Act of Texas, EBID and EPCWID entered into an Agreement ("1995 Agreement"). A copy of the 1995 Agreement, without exhibits, is attached as Exhibit 1 of this declaration.

17. Among the recitals in the 1995 Agreement are the following:

> WHEREAS, prior to the above named contracts, the Bureau of Reclamation was the federal agency that operated and maintained the Project as a whole without regard to the state boundary line and the fact that some of the irrigation drains, canals, laterals and other irrigation works cross and re-cross the state boundary line between New Mexico and Texas at numerous places; and
>
> WHEREAS, since the date of the above mentioned contracts, the parties have continued the previous practice of the Bureau of Reclamation of operating that portion of the Project known as units 6A and 6B (a map showing 6A/6B is attached hereto as Exhibit "C" which transverse aid state boundary line at numerous places as inseverable units

> without regard to such state boundary line, with EBID's personnel delivering water to all uses in unit 6A and EPCWID's personnel delivering water to al [sic] users in Unit 6B; and EBID's personnel and equipment maintaining all Project works in Unit 6A and EPCWID's personnel and equipment maintaining all Project works in unit 6B without regard to the state boundary line and whether said Project works are situate in New Mexico or Texas;. . . .

18. Paragraph 3C of the 1995 Agreement states: "[T]he parties agree that unit 6A will continue to be operated and maintained by EBID and unit 6B operated and maintained by EPCWID. Each party shall have unimpeded access to both units. . . ."

19. Because the Texas – New Mexico state line meanders through units 6A and 6B, some Texas lands receive water delivered by EBID, and some New Mexico lands receive water delivered by EPCWID. Pursuant to the 1995 Agreement, EBID personnel delivers water to all Texas users within what is commonly called unit 6A, and EPCWID personnel deliver water to all New Mexico users in what is commonly called unit 6B. EBID and EPCWID operate and maintain the Project works in those units irrespective of the state line between New Mexico and Texas.

I Jesus Reyes, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Signature /s/ Jesus Reyes

AGREEMENT

THIS AGREEMENT (the "Agreement) made and entered into this 9th day of August, 1995, pursuant to the Joint Powers Agreement Act, being Sections 11-1-1 to 11-1-7, *et seq.*, N.M.S.A. 1978 Comp., (1994 Supp.), and the Interlocal Cooperation Act, Sections 791.001-791.030 of the Texas Government Code, for the purposes and benefits set forth in said statutes regarding the parties hereto. The parties (the "parties") hereto are the Elephant Butte Irrigation District (hereinafter called "EBID") and the El Paso County Water Improvement District No. 1 (hereinafter called "EPCWID").

WITNESSETH:

WHEREAS, EBID is a public district in the State of New Mexico organized pursuant to Section 73-10-1, *et seq.*, N.M.S.A. 1978 Comp., and a public agency as defined in said Joint Powers Agreement Act; and

WHEREAS, EPCWID is a water improvement district organized pursuant to Article XVI, Section 59, of the constitution of the State of Texas and a local government as defined in said Interlocal Cooperation Act; and

WHEREAS, EBID and EPCWID receive water from dams and irrigation facilities built pursuant to the Reclamation Act of 1902, and each of the parties depends upon irrigation works, including canals, drains, laterals, and diversion structures, which are

constructed in both the State of New Mexico and the State of Texas; and

WHEREAS, such irrigation works do not always follow the state boundary lines, and therefore it is economically and practically unfeasible for either of the parties to properly maintain and operate its district and deliver water to its constituents without the cooperation of the other party; and

WHEREAS, EBID took over the function of operation and maintenance of the New Mexico portion of the Rio Grande Project (hereinafter called "the Project"), other than Elephant Butte Dam and Caballo Dam, by contracts with the Bureau of Reclamation dated February 15, 1979 and May 31, 1989 (copies of which are attached hereto and made a part hereof by reference as Exhibits "A" and "B"); and

WHEREAS, prior to the above named contracts, the Bureau of Reclamation was the federal agency that operated and maintained the Project as a whole without regard to the state boundary line and the fact that some of the irrigation drains, canals, laterals and other irrigation works cross and re-cross the state boundary line between New Mexico and Texas at numerous places; and

WHEREAS, since the date of the above mentioned contracts, the parties have continued the previous practice of the Bureau of Reclamation of operating that portion of the Project known as units 6A and 6B (a map showing 6A/6B is attached hereto as Exhibit "C") which transverse said state boundary

line at numerous places as inseverable units without regard to such state boundary line, with EBID's personnel delivering water to all users in unit 6A and EPCWID's personnel delivering water to al users in unit 6B; and EBID's personnel and equipment maintaining all Project works in Unit 6A and EPCWID's personnel and equipment maintaining all Project works in unit 6B without regard to the state boundary line and whether said Project works are situate in New Mexico or Texas; and

WHEREAS, the parties desire the rights and benefits of the above mentioned statutes and enter into this Agreement for the benefits to be derived from said statutes and to confirm and authorize the pre-existing informal arrangements between them; and

WHEREAS, the Congress of the United States passed and the President of the United States signed into law Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), which authorizes the Secretary of Interior to transfer title to the parties to easements, ditches, laterals, canals, drains and other rights-of-way which the United States has acquired on behalf of the Project; and

WHEREAS, under said Public Law 102-525, such transfer of title will be upon agreement of the parties and the Secretary of the Interior, who requires this Agreement between the parties to be formalized prior to said transfer of title; and

WHEREAS, it is in the best interests of the parties to enter into this Agreement in order to efficiently operate and maintain the Project facilities after their transfer to the parties and to secure the benefits of Public Law 102-575.

NOW, THEREFORE, the parties agree as follows:

1. *Purpose.* The parties enter into this Agreement pursuant to and for the purpose of complying with the above mentioned statutes and law and in consideration of the premises and the hereinafter set forth mutual terms and conditions.

2. *Parties to Cooperate.* The parties shall continue to cooperate in a fair and equitable manner to ensure that each party will be able to receive its water after said transfer of title through the same ditches, laterals, canals, drains, and other rights-of-way as it has heretofore and in compliance with the legal and equitable rights of and statutory and contractual obligations affecting each party.

3. *Special Covenant.* A. Each party specially covenants hereby with the other not to cause or permit any interference with or blockage of diversion dams, ditches, laterals, canals, sublaterals, drains, spillways, rights-of-way or any other facilities presently in use by either party, directly or indirectly, or of any other facility which may be necessary, for the transportation of any Project water released from Elephant Butte Dam or Caballo Dam for use by such other party or of any other water lawfully held by or

for the benefit of either of the parties for storage or delivery in or through conveyance facilities. This covenant shall be enforceable by injunction, and any breach shall entitle the injured party to invoke any other remedy to which it may be entitled, either at law or in equity. For so long as the United States and its Department of the Interior Bureau of Reclamation shall have any legal authority or responsibility to act in releasing water from Project storage or diverting Project water, then the United States is hereby granted the authority to invoke the remedies provided herein for the breach of such special covenant. Such covenant and the remedies provided herein shall be effective at such time as this Agreement becomes effective and shall continue until such time as both parties may otherwise mutually agree in writing. Furthermore, this covenant and the remedies provided in this article shall survive the execution and delivery of any deed or deeds to the parties, or either of them, pursuant to the provisions of Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), the Reclamation laws of the United States, or any other applicable law and shall continue until both districts may otherwise agree in writing.

B. The parties have a commonality of interest throughout the Rio Grande Project and, as a consequence, must have access to all Project facilities whether located in New Mexico or Texas in order to protect the interests of their constituents and will, from time to time, be required to travel to and be present at Project facilities in both states.

C. Unless and until a party provides the other party with 120 days prior written notice of that party's cancellation of the provisions of this paragraph, the parties agree that unit 6A will continue to be operated and maintained by EBID and unit 6B operated and maintained by EPCWID. Each party shall have unimpeded access to both units and any requests for maintenance by either party for work in their unit shall be in writing. Ditches, canals, laterals and drains shall be maintained so as to allow for the free flow of water without obstruction. Reports of encroachments by third parties shall be delivered to the District that holds title and said encroachments shall be resolved by the title holder in an expeditious and reasonable fashion. Unless otherwise provided by written agreement signed by both parties, neither party shall impose on the other party any carriage charge in respect of water transported through facilities located within an area being operated, owned or maintained by such party.

4. *Indemnity Against Tort Claims.* Each district agrees to indemnify and hold harmless the other and its officers, directors, agents, servants and employees from and against all loss and expenses, including without limitation all attorney fees awarded by a court and court costs, resulting from any claim for damages from personal injury or property damage arising from or in connection with any act or omission of the indemnifying district, or its officers, directors, agents, servants and employees regardless of where such act or omission is alleged to have occurred. The

parties do not intend for this agreement to create joint and several liability or a partnership.

5. *Liability Insurance.* Each party agrees to carry at all times, at its expense, public liability insurance showing the other party as an additional insured, with minimum combined single limits of $1,000,0000.00 for property damage and/or personal injury. Such public liability insurance may, at the election of the party providing such insurance, provide for a deductible amount of not more than $1,000.00 for each claim, and shall include such other provisions as reasonably may be acceptable to both parties.

6. *Reciprocal Sovereign Immunity.* As to any claim based on an alleged occurrence within the boundaries of the State of Texas, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of Texas applicable to claims against a subdivision of the State of Texas organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas. As to any claim based on an alleged occurrence within the boundaries of the State of New Mexico, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of New Mexico applicable to claims against a public district organized pursuant to Section 73-10-1 *et seq.*,

N.M.S.A. 1978 Comp. It is the intention of the parties to provide the fullest possible reciprocity to each other as to sovereign immunity from claims as is allowed by the present and any subsequent laws of the respective states under whose laws the parties exist.

7. *Payments For the Performance of Governmental Functions.* As provided by Section 791.011(d)(3) of the Texas Government Code, and See [sic] §6-6-11, et seq., N.M.S.A., 1978 Comp., 1991 Repl. Pamp., each party paying for the performance of governmental functions or services pursuant to this Agreement shall make those payments from current revenues available to such paying party.

8. *Funding.* The parties agree further that contributions from the funds of the parties (being public agencies) may be made for the purposes set forth in this Agreement, and that said expenditures shall not be in excess of the value of work performed. That payment of such public funds may be used to defray the cost of implementing the Agreement reached herein. Subject to Paragraph 7 above, the advancement of funds and payment of public funds hereunder shall be done in the ordinary course of the parties' business. The parties further agree that there shall be strict accountability for all funds, receipts and disbursements used to implement this Agreement. The parties agree that the benefits hereunder to each party and the burdens assumed by each party are of equal value.

9. *Accountability.* The parties hereto shall permit the authorized representative of the other party and the State Auditor of New Mexico and State Auditor of Texas to inspect and audit all data and records of the parties hereto relating to the performance of this contract. Both parties agree to keep strict accounting of all receipts and disbursements made in furtherance of this Agreement. Such records shall be available for inspection by the other party and by the public during business hours at the respective offices of the parties hereto.

10. *Waiver.* No waiver of any breach of this Agreement or any of the terms or conditions hereof shall be held to be a waiver of any other subsequent breach; nor shall any waiver be valid or binding unless same shall be in writing and signed by the party alleged to have granted the waiver.

11. *Merger of Contract.* This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and all such covenants, agreements, and understandings have been merged into this written Agreement. No prior statements, representations, promises or agreement of understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement and signed in a writing executed by all of the parties hereto as a modification of this Agreement.

12. *Co-Partners.* Nothing herein contained is intended or should be construed in any way to create or establish the relationship of co-partners between the parties hereto or to establish either party as the agent, representative, or employee of the other for any purpose or in any manner whatsoever. Neither party's employees shall accrue leave, retirement, insurance, or any other benefits afforded to the employees of the other party as a result of this contract.

13. *Equal Opportunity Compliance.* The parties hereto agree to abide by all federal and state laws, rules, regulations, and executive orders pertaining to Equal Employment Opportunity. In accordance with all such rules, laws, regulations, and executive orders, the parties agree to assure that no person in the United States shall, on the grounds of race, color, national origin, sex, sexual preference, age, handicap, or religion be excluded from employment.

14. *Sub-Contract.* Neither party may subcontract any or all of the services called for under this Agreement without the express written permission of the other party first had and obtained. Such written permission shall be liberally and freely given so as to facilitate the operation of the Project in a smooth fashion.

15. *Limitation of Liability.* No elected or appointed official, employee, servant, or agent shall be held personally liable under the terms of this Agreement for the actions called for in this Agreement, it

being the intent of the parties that said persons are acting in the course and scope of their employment or governmental duties and responsibilities.

16. *Term.* This Agreement shall become effective when approved by the Department of Finance and Administration, State of New Mexico. The Agreement shall continue in perpetuity unless terminated by mutual, written agreement of the parties except to the extent that this contract may be canceled in Paragraph 3C above.

17. *Amendment.* This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and approved by the relevant state agencies.

18. *Applicable Law.* The interpretation of this Agreement shall be governed by the laws of the State of New Mexico as to those sections hereof which are related to the Joint Powers Act, and by the laws of the State of Texas as to those sections hereof related to the Interlocal Cooperation Act. Each person signing this Agreement and/or authorizing such a signing on behalf of his/her respective party is acting only in his/her official capacity on behalf of his/her respective party and is not personally liable under any circumstances either jointly or severally for any obligation or liability arising as a result of this Agreement.

19. *Severability.* If any part or application of this Agreement is held to be invalid, the remainder, or its application to other situations or persons, shall not be affected.

20. *No Waiver of Sovereign Immunity.* By entering into this Agreement, EBID and EPCWID seek to obtain the benefits provided for by the statutes cited above. Their employees are "public employees" as defined by the New Mexico Tort Claims Act, Section 41-4-1 to 41-4-29, N.M.S.A. 1978 (1994 Supp.), and the Texas Tort Claims Act, and EBID and EPCWID and their "employees" as defined in said Acts do not waive sovereign immunity, do not waive any defenses and/or do not waive any limitation of liability pursuant to law of their respective states and the above named Acts. No provision of this Agreement waives any of the provisions of the New Mexico Tort Claims Act or the Texas Tort Claims Act, or any act, constitution or law that provides sovereign immunity to the parties or their officers, directors, agents, servants or employees.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

Attest:

/s/ Rudy Provencio
Rudy Provencio,
Secretary

ELEPHANT BUTTE
IRRIGATION DISTRICT

By /s/ John Salopek
John Salopek,
President

Attest:

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

/s/ Indar Singh
Indar Singh
Secretary

By /s/ John Stubbs
John P. Stubbs
President

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION, State of New Mexico

/TM By /s/ James Jimenez Date 9/18/95